No. 47651-7-II

COURT OF APPEALS, DIV. II

OF THE STATE OF WASHINGTON

North Oakes Manor Condominium Association,
Appellant,

v.

Heather Ranko and George Rankos,
Respondents.

RESPONDENT'S BRIEF OF NORTH OAKES MANOR CONDOMINIUM ASSOCIATION

Attorney for North Oakes Manor Condominium Association:

Douglas A. Schafer (WSBA No. 8652)
Schafer Law Firm
950 Pacific Ave., Suite 1050
P.O. Box 1134
Tacoma, WA 98401-1134
(253) 431-5156
schafer@pobox.com

TABLE OF CONTENTS

INTRODUCTION. 1

APPELLANT'S ISSUES. 1

STATEMENT OF THE CASE. 2

ARGUMENT. 4

1. The HOA unit owners removed the Grahams as board members by a two-thirds vote of the voting power in the HOA present and entitled to vote at the January 24, 2015, meeting, consistent with RCW 64.34.308(8) and 24.03.103(1). 4

2. The Grahams were on notice that the unit owners intended to remove them from the board, were responsible to give the meeting notice, and failed to timely raise the notice issue before the superior court. 6

CONCLUSION. 9

TABLE OF AUTHORITIES

Cases

Bldg. Indus. Ass'n of Washington v. McCarthy, 152 Wn. App. 720, 218 P.3d 196 (2009). 9

Ensley v. Mollmann, 155 Wn. App. 744, 230 P.3d 599 (2010). 9

Wesche v. Martin, 64 Wn. App. 1, 822 P.2d 812 (1992). 8

Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 122 P.3d 729 (2005) 9

Statutes

RCW 24.03.103. 5

RCW 64.34.300. 5

RCW 64.34.308. 4-6

RCW 64.34.332. . . . . 3, 8

RCW 64.34.336. . . . . 4, 5

RCW Chapter 24.03. 1

RCW Chapter 64.34. 1

INTRODUCTION

This brief of respondent is by North Oakes Manor Condominium Association (hereafter "HOA"), a Washington nonprofit corporation having eight voting condominium unit owners, the governance of which is controlled by, listed in order of priority, (1) RCW Chapter 64.34 (Washington Condominium Act), and (2) RCW Chapter 24.03 (Washington Nonprofit Corporation Act). Subordinate governing documents that were not included in the record or necessary for this review are a declaration, articles of incorporation, bylaws, and rules and regulations. RCW 64.34.010(1), .030, .208(3), .300 and .304(1)(a).

The appellant claimed to be acting as the HOA, but this respondent (the HOA now managed by board members whose election the appellant challenges) has moved this appellate court to designate as the appellants Jeff Graham and his father, John Graham, the two individuals who were removed as directors of the HOA according to the superior court order under review. The appellant's brief is referred to as Op.Br.

APPELLANT'S ISSUES

1. "The central question is whether board members can be properly removed by the affirmative vote of five unit owners." Op.Br. at 2.

2. "A secondary question is whether a vote to remove a board

member can properly be entertained at an annual owner's meeting, if there is no advance notice that disgruntled owners intend to vote on removal of a board member." Op.Br. at 3.

STATEMENT OF THE CASE

The issue of whether the Grahams were validly ever elected as directors was not an issue before the superior court in this case, but the HOA intends to raise that issue in other proceedings.

Concerning satisfaction of the statutorily required two-thirds vote, the appellant admits that at the January 24, 2105, owners' annual meeting, the vote to remove Jeff Graham and his father, John Graham, as directors was five (5) in favor and two (2) opposed. Op.Br. at 5. Five-sevenths is 71.4 percent.

Concerning the issue of advance notice of the vote to remove the Grahams from the board, the appellants Statement of the Case in its opening brief includes only one sentence: "Also, at issue was the question of notice because the undisputed evidence was that the only agenda and notice ever circulated contained no notice that a vote on board membership would be entertained at the January, 24, 2015 owners meeting. CP 183-84." Op.Br. at 7.

Appellant admits that the meeting on January 24, 2015, was a annual

owners' meeting. CP at 183. The record indicates that the appellant was quite aware that there would be a vote to remove the Grahams from the board, since there had been attempts to do that at monthly meetings beginning with the meeting on October 22, 2014. CP at 101-02 (Declaration of Jeff Graham: "One thing they've done is to hold meetings at least once a month, sometimes more frequently, and at the meetings, ***they re-vote my removal*** and such things as to "fire" the association lawyer, Mr. Mills.") See also Complaint ¶¶ 3.9, 3.11, CP at 4-5. The appellant asserted that only the board (that appellant claimed to control) could call owners meetings. Complaint ¶ 3.10, CP at 5; Declaration of Jeff Graham, CP at 102. However RCW 64.34.332 expressly allows owners' meetings to be called "by unit owners having twenty percent or any lower percentage specified in the declaration or bylaws of the votes in the association."

Appellants admit that one condominium unit (1913-C) that had been owned since before 2014 by a limited liability company of which Jeff Graham became the manager in early 2014, was transferred in a foreclosure sale on January 9, 2015, to U.S. Bank, 15 days before the owners' meeting held January 24, 2015. CP at 154. Report of Proceedings on April 17, 2015 (RP) at 7. RCW 64.34.332 provides that owners' meeting notices should be mailed or hand-delivered to each condo unit not

less than 10 nor more than 60 days in advance of any meeting ***by the secretary*** or other officer specified in the bylaws. Appellants claim that at that time ***John Graham was the secretary*** and vice-president, and Jeff Graham was the president and treasurer, and that the HOA had no other officers. Complaint ¶ 3.3, CP at 3; Complaint Relief ¶3, CP at 9.

ARGUMENT

1. The HOA unit owners removed the Grahams as board members by a two-thirds vote of the voting power in the HOA present and entitled to vote at the January 24, 2015, meeting, consistent with RCW 64.34.308(8) and 24.03.103(1).

RCW 64.34.308(8) provides in relevant part, "the unit owners, by a two-thirds vote of the voting power in the association present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the board ...."

The appellant made a frivolous argument that the quoted statute requires two-thirds of the voting power of all eight unit owners, and that each owner must personally attend the meeting in order to vote.

But the statute's meaning of the word *present* in the phrase "present and entitled to vote" in .308(8) should be recognized as including presence by proxy, as it clearly means in RCW 64.34.336(1): "Unless the bylaws specify a larger percentage, a quorum is ***present*** throughout any meeting of the association if the owners of units to which twenty-five percent of the

votes of the association are allocated are ***present*** in person or by proxy at the beginning of the meeting." (Emphasis added.)

Additional support for the superior court's correct interpretation of .308(8) is the director-removal provision of the Nonprofit Corporation Act, that applies to the governance of the HOA to the extent not it does not conflict with the Condominium Act. RCW 64.34.300. That provision, RCW 24.03.103(1), states, "Any director elected by members may be removed, with or without cause, by two-thirds of the votes cast by members having voting rights with regard to the election of any director, represented in person or by proxy at a meeting of members at which a quorum is present." That more specific provision does not conflict with .308(8), so it applies to clarify the director-removal process.

The appellant's argument that two-thirds of all the unit owners in the HOA must actually attend a meeting to remove a director would render superfluous the phrase "at which a quorum is present" in RCW 64.34.308(8). Attendance by two-thirds of the unit owners would always constitute a quorum under RCW 64.34.336(1) that sets a quorum at twenty-five percent of eligible voters unless a higher percentage is set by the bylaws, because it is inconceivable that bylaws would set a quorum as high as two-thirds.

Lastly, when adopting the Condominium Act, the legislature knew

full well how to specify, as the appellant wrongly suggests it did in .308(8), a requirement for a percentage of the total voting power allocated among all the unit owners. The legislature did so in RCW 64.34.308(3). That subsection requires the board to present its recommended budget at a meeting of the unit owners for ratification. It states, "Unless at that meeting the owners of units to which a majority of the votes in the association are allocated or any larger percentage specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present."

2. The Grahams were on notice that the unit owners intended to remove them from the board, were responsible to give the meeting notice, and failed to timely raise the notice issue before the superior court.

Actual Notice. As noted in the Statement of the Case, above, the Grahams and their attorney, Mr. Mills, knew full well that the other unit owners of the HOA intended to remove them from the board, beginning at least at the meeting on October 22, 2014.

Responsibility to Give Notice. As noted in the Statement of the Case, above, John Graham and Jeff Graham, claiming to be the sole officers of the HOA, were the ones responsible for giving notices of HOA owners' meetings. If they failed in that responsibility (as they failed in others), they should not claim benefit from their failure.

Failure to Timely Raise the Notice Issue. The appellant did not raise the notice-of-meeting issue in it motion for summary judgment (CP at 84-95) or its supporting declaration (CP at 96-102), nor did it raise that notice-of-meeting issue at the April 17, 2015, hearing on it motion for summary judgment. RP at 1-25. The appellant did not raise the issue even in its motion for reconsideration (CP at 171-78), but first in a later-filed supplemental brief (CP at 179-82) and supporting declaration. CP at 183-84. Recognizing the untimeliness of the issue, the appellant argued in that supplemental brief, with no authority whatsoever, that U.S. Bank's constitutional due process rights were violated if it failed to receive notice of the January 24, 2015, owners' meeting. Plainly, the appellant lacks standing to assert the constitutional rights of U.S. Bank, and the appellant's claim that the bank's constitutional right were violated if it failed to receive notice of the meeting is wholly unsupported.

Arguing this issue in it opening brief, the appellant wisely abandoned its argument that U.S. Bank's constitutional rights were violated, and simply asserts that the director-removal votes were void based on RCW 64.34.332. But the policy of that statute appears fulfilled since the owners of seven of the eight condominium units were present, in person or by proxy, and voted at the January 24, 2015, meeting.

The appellant's sole argument is concerning the notice of that meeting

to the owner of the condominium addressed as 1913-C, that a LLC managed by Jeff Graham owned until the foreclosure sale on January 9, 2015, to U.S. Bank. As noted above, RCW 64.34.332 directs HOA officers to give notice of owner meetings 10 to 60 days before the meeting. The foreclosure sale to U.S. Bank apparently occurred 15 days before the meeting. The record is silent concerning when notices of the meeting were hand-delivered to the condominium units or mailed to their owners, and silent concerning when the HOA was informed that U.S. Bank had acquired ownership of condominium unit 1913-C. None of these relevant facts were presented to the superior court before it entered the appealed ruling adverse to the appellant, because appellant raised this issue as an afterthought following that adverse ruling. U.S. Bank has not challenged the validity of the January 24, 2015, owners' meeting and the removal at that meeting of the Grahams from the HOA board.

Because appellant failed to timely raise this issue of the adequacy of the meeting notice, the appellate court should not consider it. Issues first raised on appeal or in a motion for reconsideration of an adverse ruling are not considered on appeal, under well-established case law, as indicated by the following quotations from two of the scores of published opinions:

> "In any event, BIAW first mentioned the federal provision in its motion for reconsideration. For that reason alone, we need not consider it. See *Wesche v. Martin*, 64 Wn. App. 1, 6–7, 822 P.2d 812 (1992) (issues first raised in motion for reconsideration need

not be considered on appeal)."

Bldg. Indus. Ass'n of Washington v. McCarthy, 152 Wn. App. 720, 738, 218 P.3d 196, 204-05 (2009).

> "Ensley raised both of these arguments for the first time in his motion for reconsideration. But "CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision." *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005)."

Ensley v. Mollmann, 155 Wn. App. 744, 754, 230 P.3d 599, 604 (2010).

CONCLUSION

The appellant's argument for its central issue, the requisite vote, are contrary to statutory law.

The appellant's arguments for its secondary issue, the meeting notice, are unsupported by relevant facts and were not timely to warrant consideration.

Respectfully submitted this 3rd day of December, 2015.

Douglas A. Schafer, Attorney for Respondent
North Oakes Manor Condominium Association
(WSBA No. 8652)

Proof of Service

I certify that today I emailed to the below-listed attorneys the Brief of Respondent North Oakes Manor Condominium Association being filed today.

John Stratford Mills
J. Mills, Lawyer
705 S 9th St Ste 201
Tacoma, WA, 98405-4622
jmills@jmills.pro

Elizabeth Rankin Powell
Attorney at Law
535 Dock St Ste 108
Tacoma, WA, 98402-4629
powelllaw@comcast.net

December 3, 2015

Douglas A. Schafer

Douglas A. Schafer, WSBA 8652